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July 26, 2006

The Hon. Terry J. Hatter, Jr.  
United States District Court  
Western Division of Central District  
312 N. Spring Street, Dept. 17  
Los Angeles, CA 90012

Re: OSVOG's Comments On Proposed Settlement Agreement And Consent Order  
*Omega Chemical PRP Group LLC, et al. v. Aaron Thomas Co.*,  
Case No. 2:04 CV-04-01340-TJH-JWJ  
Central District of California, Western Division

Dear Judge Hatter:

We write on behalf of the members of the Omega Small Volume Group ("OSVOG"), identified on the attached list. OSVOG is not a party to the pending litigation, but nonetheless received a copy of the proposed Settlement Agreement And Consent Order, together with the related stipulation and order, from the members of the Omega PRP Organized Group ("OPOG"). We would like to share a concern with the proposed settlement order.

The stipulation and proposed order seeks court approval of a settlement between OPOG and certain Federal agencies (the Federal Defendants) for those agencies' responsibility for cleaning up pollution caused by wastes they sent to the Omega Chemical and Recycling Facility in Whittier, California. That site has been designated a Federal Superfund site. The settlement would exonerate the Federal agencies for their fair share of clean-up costs, in exchange for a payment of approximately \$1.7 million to OPOG. OPOG represents only a sub-set of all Potentially Responsible Parties for this Superfund site. Under the Federal Comprehensive Environmental Response, Compensation & Liability Act (42 U.S.C. §§ 9601 *et seq.*, commonly known as "CERCLA" or "Superfund"), all Potentially Responsible Parties, including federal agencies, are jointly and severally liable for clean-up costs ("Response Costs"), subject to contribution among PRPs based on equitable principles. (42 U.S.C. §§ 9607 and 9613.)

In general, OSVOG does not oppose the proposed settlement between the Federal Defendants and OPOG. As OSVOG understands the agreement, OPOG is assuming responsibility for the Federal Defendants' equitable share of the Omega Response Costs:

- ... Plaintiffs agree that they will assume responsibility for any soil and/or groundwater contamination attributed to the waste sent to the Site by the United States . . . . By agreeing to assume responsibility for any soil and/or groundwater contamination attributed to the waste set to the Site by the United States, Plaintiffs agree that such waste shall be attributed to Plaintiffs, and
- Plaintiffs shall be liable for any payments or work obligations associated with such waste. -

(Section 9(c) of the Settlement Agreement and Consent Order). This assumption of liability by OPOG is appropriate, given that it is OPOG, alone, that has agreed to the settlement amount and is receiving the settlement funds from the Federal Defendants.

OSVOG is concerned, however, that the proposed Order may contain an unintended ambiguity. The proposed order includes a statement that the "United States is entitled to contribution protection for Covered Matters, as defined in the foregoing Agreement, pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), the Uniform Comparative Fault Act, *and any other applicable provision of federal or state law, whether by statute or common law.*" (Emphasis added). As described below, OSVOG is concerned that the inclusion of the phrase "and any other applicable provision of federal or state law, whether by statute or common law" may create ambiguity due to inconsistencies between the provisions of the Uniform Comparative Fault Act and certain state laws.

Under section 6 of the Uniform Comparative Fault Act, a non-settling party's liability is reduced by the settling defendant's proportionate share of liability. ("[T]he claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation . . .") 12 U.L.A. 147 (1996). The settling Plaintiffs bear the risk of striking a poor bargain and the Court need not even consider the amount of the settlement itself at the time of approving the settlement. *Comerica Bank-Detroit v. Allen Industries, Inc.*, 769 F.Supp. 1408, 1414 (E.D. Mich. 1991); *United States v. Western Processing Co.*, 756 F.Supp. 1424, 1431 (W.D. Wash. 1990); *Allied Corp. v. Acme Solvent Reclaiming, Inc.*, 771 F.Supp. 219, 223 (N.D. Ill. 1990); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 1987 WL 27368 (N.D. Ill. Dec. 4, 1987).

However, the generic reference to "and any other applicable provision of federal or state law, whether by statute or common law" may create an ambiguity. This is because, under California Code of Civil Procedure § 877, a "good faith" settlement reduces "the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is greater." In other words, a settlement subject to California's C.C.P. section 877 reduces non-settling party's liability only by the amount paid in settlement, rather than by the settling defendants' full share of liability. The result is that, under section 877, the non-settling party bears the risk that the settlement amount was too low. For this reason, a "good faith" settlement under C.C.P. section 877 requires a more in-depth analysis of the settlement by the Court. *Tech Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal.3d 488, 499

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(1985); also see California C.C.P. § 877.6 delineating specific procedures that must be followed and findings that must be made. The Stipulation And Order does not contain enough information to allow the Court to make this sort of evaluation of the settlement.

It seems clear that the potential ambiguity created by the generic reference to "any other applicable provision of federal or state law, whether by statute or common law" was unintended. OSVOG suggests the Court simply strike this reference from the proposed Order, so that the sentence stops after, "United States is entitled to contribution protection for Covered Matters, as defined in the foregoing Agreement, pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), [and] the Uniform Comparative Fault Act." Proposed Order at 1, ¶ 2.

Thank you for your consideration of these issues.

Very truly yours,

ARCHER NORRIS

*Peter W. McGaw by JLK*

Peter W. McGaw

PWM:JLK:sea

Enclosure (list of OSVOG members)

cc: Paul Cirino, Esq.  
Keith Millhouse, Esq.  
Larry Gutterridge, Esq.  
Jim Collins, Counsel for US-EPA, Region IX

***Omega Small Volume Group***  
***(effective April 25, 2006)***

City of Whittier

Del Mar Avionics, Inc.

Eaton Corporation

Gaiser Tool Company

National Broadcasting Company (NBC)

NCR Corporation (fka AT&T)

Quality Fabrication, Inc.

Reed & Graham, Inc.

Sierracin Corporation

Skypark Manufacturing (Formerly Burtin Urethane Corporation)

Specific Plating Company, Inc.

PolyOne Corporation (formerly The Geon Company)

W&B Marketing, Inc.

Yellow Freight Systems, Inc.